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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2767/2016*, **

Communication submitted by:	Lydia Cacho Ribeiro (represented by Article 19)
Alleged victim:	The author
State party:	Mexico
Date of communication:	13 October 2014
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 9 May 2016 (not issued in document form)
Date of adoption of Views:	17 July 2018
Subject matter:	Detention of a journalist for defamation and calumny following publication of a book about a child sexual exploitation ring
Procedural issues:	Exhaustion of domestic remedies, incompatibility with the provisions of the Covenant, insufficient substantiation of the complaint
Substantive issues:	Prohibition of torture and ill-treatment, gender equality, prohibition of arbitrary detention, treatment of persons deprived of their liberty, due process guarantees, *nullum crimen*, freedom of expression
Articles of the Covenant:	2 (3), 3, 7, 9, 10, 12, 14 (1), 15 (1) and 19
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

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1.1 The author of the communication is Lydia Cacho Ribeiro, a national of Mexico born in 1963. She claims that the State party has violated her rights under articles 2 (3), 3, 7, 9, 10, 12, 14 (1), 15 (1) and 19 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 15 June 2002.

1.2 On 21 November 2016, the Special Rapporteurs on new communications and interim measures, acting on behalf of the Committee, rejected the State party's request that the admissibility of the communication be considered separately from its merits.

The facts as submitted by the author

2.1 The author is a journalist, human rights defender and founder of the Centro Integral de Atención a la Mujer (Integrated Support Centre for Women), an organization devoted to providing protection and support for victims of sexual violence, based in Cancún, State of Quintana Roo. In March 2005, using accounts given by a number of victims who had received assistance at the Centre, the author published a book entitled *Los Demonios del Edén. El poder que protege a la pornografía infantil* (The Demons of Eden: the Power behind Child Pornography), in which she revealed the existence of a corruption and child exploitation ring.[1] In the book, the author described the involvement in the ring, as principals or accessories, of various public authorities and business leaders, including José Kamel Nacif Borge, a prominent textile industrialist and owner of one of the largest fortunes in Mexico.

Criminal proceedings against the author, detention and torture of the author

2.2 In July 2005, Mr. Nacif filed a complaint against the author for defamation and calumny in the State of Puebla.[2, 3] As a result of this complaint, the public prosecution service opened a preliminary investigation[4] on 12 July 2005; the author was not informed of the investigation. On 10 August 2005, the public prosecution service brought criminal proceedings before the Fifth Criminal Court of the State of Puebla. On 15 September 2005, the Court declined jurisdiction to hear the case *ratione loci*. On 10 October 2005, the public prosecution service again brought criminal proceedings before the Court, which, on 12 October 2005, opened a criminal case and issued a warrant for the author's arrest.

2.3 On 16 December 2005, the author was detained outside the offices of the Centro Integral de Atención a la Mujer by a group of at least 10 persons, including 3 judicial police officers of the State of Puebla, 2 police officers of the State of Quintana Roo and at least 5 private agents employed by Mr. Nacif. Four cars, one belonging to a company owned by Mr. Nacif, were used in the operation. No arrest warrant was shown to the author. The author was taken to the premises of the then Office of the Attorney General (now the Office of the Prosecutor General) of the State of Quintana Roo, where she was held in incommunicado detention.

2.4 That same day, the author was taken by car to the State of Puebla; she was accompanied by judicial police officers of that State, all of whom were men. As she was getting into the vehicle, one of the officers grabbed her by the hair and shoved her into the

[1] The book included the accounts of interviewed victims and was published with their consent.

[2] Mr. Nacif's state of residence.

[3] Article 357 of the Social Protection Code of the Free and Sovereign State of Puebla, which was in force at the time of the events, provided: "Defamation consists in communicating, to one or more persons, the false imputation to another person or entity of an act that can cause dishonour, discredit, prejudice, or expose that person or entity to the contempt of another." Article 358 stated: "The offence of defamation shall be punishable by a prison term of from 6 months to 4 years and a fine of from 10 to 100 days of wages." Article 362 defined and criminalized calumny in the following terms: "A prison term of from 6 months to 4 years and a fine of from 10 to 100 days of wages shall be imposed on: I. Anyone who imputes to another a specific act defined as an offence under law, if such act did not occur or if the person to whom it is imputed is innocent; II. Anyone who presents false claims, accusations or complaints, such being understood as those in which the perpetrator imputes an offence to a particular person knowing that such person is innocent or that the offence has not been committed."

[4] A pretrial investigation carried out to determine whether proceedings should be brought before the criminal courts.

back of the car. During the approximately 1,500 km journey, which lasted about 20 hours, she was denied food and the medication she needed to treat her bronchitis and was allowed to go to the bathroom only once. She was only allowed to make a brief telephone call to her partner, which was cut off when the author reported that she was being accompanied by male police officers. She was not allowed to sleep but was forced to remain seated with her hands behind her back, under threat of being handcuffed. She was also subjected to psychological and physical torture, including sexual advances and touching, death threats and verbal and physical violence. On several occasions, one of the officers inserted a gun into the author's mouth, moving it around in circles and making sexual comments. The same agent later ran the gun over the author's breasts, spread her legs apart and pointed the gun at her genitals. He then pushed the gun hard against the author's abdomen and began to unzip her trousers, at which point the author wet herself uncontrollably, causing the officer to shout at her that she was a "pig".

2.5 On 17 December 2005, on her arrival at the jail cells of the Office of the Attorney General of the State of Puebla, the author was taken to a room where an individual shoved her up against the wall, opened her blouse and touched her breasts. He then grabbed her violently by the hair and pushed her head against the wall. Later that day, the author was brought before the Fifth Criminal Court of the State of Puebla, which ordered her placement in pretrial detention at the Social Rehabilitation Centre in Puebla. During her pretrial detention, the author was subjected to further threats and psychological and physical violence. On the same date, her bail was paid and the author was released.

2.6 On 23 December 2005, the Fifth Criminal Court of Puebla issued a detention order against the author for defamation and calumny. On 27 December 2005, the author appealed the detention order to the High Court of Justice of the State of Puebla. On 13 January 2006, the Court ruled that the calumny charge against the author was unfounded and amended the order, such that the proceedings against her related solely to the offence of defamation.

2.7 On 10 January 2006, the author filed an application for a declaration of lack of jurisdiction with the Fifth Criminal Court of the State of Puebla, arguing that the competent courts to hear the case were those of the Federal District (now Mexico City) because the publication, presentation and sale of the book had taken place in Mexico City. On 18 January 2006, the Fifth Court ruled that it had no jurisdiction to hear the case and that the competent courts were those of the State of Quintana Roo.[5] On 22 September 2006, the author filed a new application for a declaration of lack of jurisdiction, arguing in favour of the competence of the Federal District courts. On 4 October 2006, the First Criminal Court of Quintana Roo ruled that it had no jurisdiction to hear the case and referred it to the Federal District.

2.8 On 22 December 2006, the Fourth Criminal Court of the Federal District dismissed the case on the grounds that the offence of defamation did not exist in that entity and ordered the author's release.

Investigation procedure by the Supreme Court of Mexico

2.9 On 21 December 2005, an article was published in the press in which Mr. Nacif acknowledged the support received from the Governor of the State of Puebla in connection with the author's arrest.[6] On 14 February 2006, recordings of telephone conversations

[5] The Fifth Criminal Court of the State of Puebla founded the jurisdiction of the courts of the State of Quintana Roo on the fact that the complaints by the victims of sexual exploitation that served as the basis of the book had been filed in that State.

[6] In the article, published in the newspaper *La Jornada*, Mr. Nacif said: "I told the Governor that this woman was libelling me, and he said no one is libelled here — and boom, they issued an arrest warrant for her." In the same article, the Governor of Puebla said: "If you ask me, this woman is a delinquent who committed an offence; if she says she is innocent, let her prove it in court instead of courting publicity in the media." The Attorney General of the State of Puebla acknowledged that the author was not notified of the arrest warrant so as to prevent her from "kicking up a fuss" and said that "reporters should hold on to their stories before they are made public, since their first duty is to inform the authorities". When asked about support for the author's case from various human rights organizations, such as Amnesty International and the World Organization against Torture, the

between the Governor of the State of Puebla and Mr. Nacif[7] were transcribed in the press and aired on radio and television, in which Nacif thanked the Governor for his efforts to arrest the author.[8] In subsequent public statements to the press, Mr. Nacif confirmed that he had asked the Governor of Puebla to intervene in the author's arrest and praised the Governor's "decisive action" and "firm hand", adding that he had wanted to "teach the author a lesson".

2.10 On 22 February 2006, the Congress of the Union requested the Supreme Court to exercise its power to investigate the facts relating to the author's detention and prosecution on the grounds that they might constitute "serious violations of individual guarantees".[9] On 29 November 2007, by a vote of 6 to 4, the Supreme Court concluded that the author's individual guarantees had not been seriously violated.

Criminal proceedings initiated by the author in respect of her detention and torture

2.11 On 13 March 2006, the author filed complaints with the Office of the Attorney General of the Republic concerning the offences of torture, attempted rape, arbitrary detention, intimidation and abuse of authority against two judicial officers of Puebla, and complaints concerning bribery, influence peddling, offences against the administration of justice and the offence of collusion among public servants against the Governor of Puebla, the Attorney General of the State of Puebla and the presiding judge of the Fifth Criminal Court of the State of Puebla, and all those who might be found responsible. The author's complaints led to the opening of two preliminary investigations by special prosecutors of the Office of the Attorney General of the Republic; the investigation was subsequently referred to the Office of the Special Prosecutor for Offences Committed against Journalists.

2.12 On 30 January 2008, the Office of the Special Prosecutor for Offences Committed against Journalists brought criminal proceedings before the Second Criminal Court of First Instance of the Judicial District of Cancún (State of Quintana Roo) in respect of the two State of Puebla judicial police officers alone, as probable perpetrators of the offence of torture. On 6 May 2008, the Second Criminal Court dismissed the criminal proceedings against the two defendants; the decision was confirmed on appeal by a decision of 8 January 2009 of the High Court of Justice of the State of Quintana Roo. Regarding the responsibility of the other persons against whom complaints were made, the Office of the Special Prosecutor decided on 16 June 2008 not to bring criminal proceedings.

2.13 In 2009, the Office of the Attorney General of the Republic launched new preliminary investigations against "those responsible" for the offences of abuse of public office and abuse of authority, in accordance with recommendation 16/2009 of the National Human Rights Commission.[10] However, these preliminary investigations were concluded without criminal charges being filed.

2.14 On 18 June 2009, the Office of the Attorney General of the State of Quintana Roo opened a preliminary investigation against a third judicial officer, of that State. The investigation was closed on 18 October 2011 on the ground that there was insufficient evidence to launch a criminal prosecution; the author was not informed of the decision.

Attorney General replied that what the author was doing was "pressuring the authorities, which is typical of people like her".

[7] In an open letter to the public, dated 6 April 2011, Mr. Nacif acknowledged the authenticity of the recordings.

[8] The conversation contained derogatory language and insults used by the Governor to refer to the author, including the following: "Well, I sure gave that old bitch her [expletive] comeuppance yesterday. I told her that in Puebla the law is respected and anyone who commits a crime is called a criminal."

[9] A power provided for under article 97 (2) of the Constitution of the United Mexican States (the provision has been repealed).

[10] The National Human Rights Commission — the national human rights institution of Mexico — received a complaint in December 2005 regarding the author's arbitrary detention, incommunicado detention, torture and cruel and inhuman treatment. In recommendation 16/2009, of 6 March 2009, the Commission concluded that the author had been subjected to acts of torture, but it held only two Puebla State judicial police officers responsible.

2.15 On 2 December 2014, the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression launched a new preliminary investigation and brought criminal proceedings against the two Puebla State judicial police officers. On 9 December 2014, the Second District Court of the State of Quintana Roo issued an arrest warrant for the two officers. On 11 December 2014, one of the officers was arrested; the second is currently a fugitive from justice. On 17 December 2014, a detention order was issued against the arrested officer, who was remanded in custody.

Criminal proceedings initiated by the author in relation to threats received after her release

2.16 Following the author's release, she was provided with protection by the federal authorities, including escorts when travelling. Nevertheless, on 7 May 2007, the author was the victim of an attack when the tyres of the vehicle that was to take her from the airport to her home were punctured, causing the driver of the vehicle to lose control shortly after setting off. In addition, between February and May 2009 and July 2012, the author received several death threats by email and telephone and on her blog. The author filed several complaints of threats and intimidation with the Office of the Attorney General of the Republic, which resulted in the opening of four preliminary investigations. However, the investigations did not lead to criminal proceedings being brought.

Request for precautionary measures to the Inter-American Commission on Human Rights[11]

2.17 On 19 June 2009, the author submitted a request for precautionary measures to the Inter-American Commission on Human Rights. On 10 August 2009, the Inter-American Commission granted precautionary measures to safeguard the life and physical integrity of the author, her family and colleagues at the Centro Integral de Atención a la Mujer.

The complaint

3.1 The author claims that she is the victim of a violation of her right to freedom of expression under article 19 of the Covenant, since she was arrested and charged with defamation and calumny for publishing her book. The author submits that, although the Committee has recommended that the State party repeal the offences of defamation and calumny throughout the country,[12] they remain offences in 16 of the 33 criminal codes in existence in the State party. These offences are broadly and ambiguously defined and unduly restrict freedom of expression, since they do not meet the requirements of legality, necessity and proportionality and are intended to have a censorship effect. The custodial penalty provided for these offences is disproportionate to any harm that may be caused.

3.2 The author submits that in the State party each federative entity has considerable latitude in determining what conduct is criminalized and that this amounts to unequal treatment of persons subject to the jurisdiction of the State party based on their state of residence. Thus, while people are able to exercise their right to freedom of expression in some states, they may be criminally prosecuted for defamation, calumny and vilification in other states. In the author's case, the judicial authorities of the State of Puebla charged her with the offences of defamation and calumny, while the judicial authorities of Mexico City dismissed charges for the same acts on the grounds that the offences did not exist in that jurisdiction.

3.3 The author further claims that she is a victim of a violation of article 15 (1) of the Covenant, since the offences of defamation and calumny continue to exist in 16 states of Mexico, without being clearly defined in the criminal codes of those states. The author maintains that such a situation impedes legal predictability and allows for the extraterritorial application of those offences in other jurisdictions where they do not exist.

[11] Although the Inter-American Commission on Human Rights adopted precautionary measures in respect of the author's case, it was not registered as an individual case, which is an option available under article 25 of the Commission's rules of procedure.

[12] See CCPR/C/MEX/CO/5, para. 20.

3.4 The author submits that her detention was unlawful and arbitrary, in violation of article 9 of the Covenant, since it was based on a restriction of the freedom of expression, contrary to the Covenant. She adds that her detention resulted from an abuse of public office, since the Governor of the State of Puebla ordered her to be criminally investigated and detained using his powers as a senior public official, as was clear from the recordings of the conversations between the Governor and Mr. Nacif that had been made public. The arrest was made by the authorities of the States of Puebla and Quintana Roo, who had no material or territorial jurisdiction to prosecute the alleged acts. Furthermore, the officers who arrested her had not been authorized to do so, since the prosecutor's office of the State of Puebla requested the cooperation of its counterpart in the State of Quintana Roo and sent it the names of the two arresting officers from the Puebla judicial police six hours after the arrest had been carried out. Lastly, the author states that she was admitted to the Social Rehabilitation Centre in Puebla even though no documents authorizing her admission had been submitted.

3.5 The author adds that the detention order contained no assessment of the constitutionality and proportionality of the custodial measure imposed on her. Furthermore, no evaluation was made of whether there was sufficient evidence to support a claim for the moral damages or discredit caused to the complainant by the publication of the author's book. The detention order therefore amounted to disproportionate censorship of the author's investigative journalism.

3.6 The author claims that the conditions of her transfer from the State of Quintana Roo to Puebla and the treatment to which she was subjected during that transfer constitute a violation of article 7 of the Covenant. As a result of these events, the author was diagnosed with post-traumatic stress disorder.[13] In addition, the conditions of her detention constituted a violation of article 10 of the Covenant.

3.7 The author further claims that she was a victim of gender violence — because she is a woman — during her detention and transfer to the State of Puebla. The fact that she was accompanied by male officers alone put her at risk of sexual assault. Moreover, the officers accompanying her made sexual comments to the effect that if she wanted to eat she had to "behave and perform oral sex on them" or that "she was their little toy and they were going to have a lot of fun".

3.8 The author submits that the criminal proceedings against her were fraught with violations of the right to due process, as recognized in article 14 (1) of the Covenant, including: (a) the failure to give notice of the opening of a preliminary investigation against her by the prosecution service; (b) the lack of territorial jurisdiction of the criminal court of the State of Puebla; (c) the failure to notify the author of the reasons for her detention; (d) the refusal to allow her to communicate with her lawyer during her detention and transfer to the State of Puebla; (e) the involvement of private individuals close to Mr. Nacif in her arrest; and (f) the imposition of a bail amount disproportionate to the nature of the offences (140,000 Mexican pesos (US$ 7,400), an amount which was later halved).

3.9 The author also submits that the courts that heard the criminal case against her lacked independence and impartiality. The commission of inquiry established by the Supreme Court of Mexico found that there was evidence of a "relationship between Nacif and the judiciary of the State of Puebla".[14] The author claims that there was an agreement between private individuals and executive and judicial authorities of the State of Puebla, including the Governor and the president of the High Court of Justice of that State, to persecute the author and punish her for her journalistic work and to produce a chilling effect on other journalists.

3.10 The author submits that domestic remedies have not been effective in ensuring, within a reasonable time, the investigation and punishment of those responsible for her arbitrary detention and torture and the threats made against her. Eight years after her

[13] The author provides a copy of a medical/psychological expert evaluation dated 29 September 2006 from the Office of the Special Prosecutor for Offences Related to Acts of Violence against Women.

[14] The author provides a copy of the transcript of the ordinary public session of the Supreme Court, sitting in plenary, held on Monday, 26 November 2007.

detention, and notwithstanding the extensive evidence adduced, no significant progress has been made in the investigations against those responsible for acts of torture. Those investigations have been unjustifiably prolonged and ineffective, in violation of article 2 (3) of the Covenant.

3.11 Lastly, the author claims a violation of her right to liberty of movement within Mexico, as recognized in article 12 of the Covenant.

3.12 The author requests the Committee to call on the State party: (a) to conduct a thorough investigation of the author's arbitrary detention, torture and ill-treatment and of the lack of due process guarantees and to take appropriate measures against those responsible for such acts; and (b) to provide the author with full and appropriate compensation for the harm suffered.

State party's observations on admissibility

4.1 In its observations of 6 July 2016, the State party maintains that the communication is inadmissible because the author has failed to exhaust domestic remedies. First, the State party points out that an application for *amparo* was the effective and appropriate remedy for addressing the claims brought by the author to the Committee, since *amparo* is the usual remedy for protecting human rights. Specifically, the author should have lodged an *amparo* appeal to challenge the constitutionality of the offences of calumny and defamation, which at the time were defined under the criminal legislation of the State of Puebla.

4.2 Second, a number of criminal investigations are under way into the facts described by the author. They include several investigations initiated since 2006 by the Attorney General's Office into the complaints brought by the author. As part of these investigations, a suspect was arrested and a detention order was issued against him for the offence of torture on 17 December 2014. The criminal proceedings are currently at the pretrial stage. The arrest warrant for the second judicial officer charged has yet to be executed. Regarding the investigations into collusion between individuals and high-level Mexican authorities, the State party points out that preliminary investigations by the Attorney General's Office have been under way since 2007, but that it has not been possible to bring criminal proceedings on the basis of the evidence currently available. With regard to the author's complaints of threats, the State party reports that, on 18 May 2007, the prosecution service opened a preliminary investigation into an alleged criminal attack against the author. However, on 8 July 2013, the prosecution service decided against bringing criminal proceedings. On 4 March 2010 and 5 October 2012, the prosecution service opened preliminary investigations into the author's complaints of threats; the investigations are ongoing.

4.3 The State party further submits that the communication is incompatible with the provisions of the Covenant. It points out that it is for the Mexican authorities to investigate the alleged facts and to evaluate the facts and evidence, unless it can be shown that there has been arbitrariness or a denial of justice, which is not the situation in the present case. The State party submits that, in addition to the criminal investigation conducted by the Office of the Attorney General of the Republic, the Supreme Court of Mexico investigated the allegations and that, in the course of that investigation, the author had the opportunity to testify and submit evidence. However, following the completion of the investigation on 29 November 2007, the Court found that it had not been established that the author's individual guarantees had been seriously violated in the course of the criminal proceedings against her, a matter which the Committee is barred from re-evaluating.

Author's comments on the State party's observations on admissibility

5.1 In her comments of 7 October 2016, the author submits that there has been an unjustified delay in access to justice, since no progress has been made in the investigation of the complaints filed with the Office of the Attorney General of the Republic in March 2006. Criminal proceedings for the offence of torture were not brought against two judicial officials until December 2014, that is, nine years after the initial complaints were lodged and after the communication was submitted to the Committee in October 2014. Regarding the other investigations, they remain open after 10 years, a delay that cannot be justified by

the complexity of the case. The author adds that, given the inaction of the prosecution service, she alone has repeatedly sought to move forward the only proceedings open against one of the judicial officials.

5.2 With regard to the failure to exhaust the remedy of *amparo* in respect of the constitutionality of the criminal provisions of the State of Puebla defining the offences of defamation and calumny, the author submits that this extraordinary remedy would have been ineffective in her case, since an application for *amparo* would have led to a suspension of the main proceedings against her while the question of the constitutionality of those legal provisions was decided,[15] thereby prolonging the main proceedings and increasing the risk of further attacks against the author during her pretrial detention. The remedy that at that time afforded the author the best protection was an appeal against the detention order. Furthermore, the author filed several applications for a declaration of lack of jurisdiction. The author thus submits that she has exhausted the ordinary, appropriate and available remedies.

5.3 The author further submits that an *amparo* application against the arrest warrant would not have been appropriate, since the warrant had already been executed and the Constitution provides that an application for *amparo* cannot be filed in respect of "violations that have already been committed".[16] She adds, in this connection, that she could not lodge an application for *amparo* before her detention, since she was never notified of the existence of a preliminary investigation against her. The author points out that there is no specific procedure for restoring a person's liberty or for repairing the harm caused by unlawful or arbitrary detention.

5.4 The author points out that, during his mission to Mexico in 2014, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment described as "generalized" the use of sexual violence as a form of torture, mainly against women detainees, and the prevailing impunity in such cases.[17]

5.5 The author submits that the investigations conducted by the Supreme Court of Mexico and the National Human Rights Commission are not binding judicial procedures. Furthermore, as no criminal proceedings have been concluded, there is no res judicata.

State party's observations on the merits

6.1 In its observations of 24 March 2017, the State party reiterates its arguments on the inadmissibility of the communication. It insists that the author should have lodged a direct *amparo* application against the provisions establishing the offences of defamation and calumny and an indirect *amparo* application against "the official act that resulted in the arrest warrant for the author".

6.2 The State party submits that the power of investigation vested in the Supreme Court of Mexico at the time of the events constituted a judicial remedy for constitutional review.

6.3 The State party maintains that the communication has become moot, since it has addressed the specific situation raised therein by repealing, on 23 February 2011, the articles of the Social Protection Code for the Free and Sovereign State of Puebla criminalizing defamation and calumny. The offences were also removed from the Criminal Code of the State of Quintana Roo. According to the State party, the fact that the two offences remain in the criminal codes of other states does not constitute a violation of the Covenant as far as the present communication is concerned. The State party adds that steps have also been taken to remedy the general situation raised by the present communication. In this connection, on 5 July 2010, the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression was established with the task of coordinating the investigation and prosecution of offences against journalists. Furthermore, in June 2012, the Mechanism for the Protection of Human Rights Defenders and Journalists, which includes civil society representatives, was established with a mandate to protect journalists in the exercise of their profession.

[15] Article 73 (X) of the Amparo Act (repealed).
[16] Ibid.
[17] See A/HRC/28/68/Add.3, paras. 28 and 35.

6.4 The State party submits that, in order to determine a violation of the author's right to freedom of expression, it must be shown that the authorities colluded to use the judiciary against her, which has not been proven in the present case. The State party adds that the burden of proof rests with the author to demonstrate such collusion, but that she has presented only one piece of evidence, which was acquired unlawfully, namely the recordings of the conversations between the Governor of the State of Puebla and Mr. Nacif. In any event, such evidence is inadmissible, since it has no probative value because the persons involved have not acknowledged the veracity of the conversations and no further evidence has been produced to establish their authenticity. Furthermore, the provenance of the recordings and the manner of their acquisition are not known.

6.5 The State party maintains that the author's detention was justified by the existence of a complaint concerning offences under the criminal legislation of the State of Puebla at the time of the events. Accordingly, the prosecution service opened a preliminary investigation against the author, and her arrest was ordered. The State party adds that the arresting police officers were properly identified and that they informed the author of the charges against her. Furthermore, she was allowed to make a telephone call.

6.6 The State party submits that the author's arrest and detention were lawful, necessary and proportionate. One day after her arrest, the author was presented before a judge, who ordered her release on bail. Her detention was therefore judicially reviewed. The State party submits that the author's allegations regarding how she was treated during her transfer are a separate matter and the subject of criminal investigations.

6.7 The State party maintains that the author's detention alone does not constitute a violation of her right to freedom of expression and that it has not been proven that her detention was intended to undermine the freedom of expression.

6.8 As regards the author's allegations concerning the failure to notify her of the investigations against her, the State party points out that neither the Constitution nor the criminal law of Mexico requires the prosecution service to notify individuals that they are the subject of an investigation for an offence.

6.9 As to the effectiveness of the ongoing criminal investigations and, in particular, the time elapsed before the opening of the investigations and the arrest of a suspect, the State party points out that the obligation to investigate is an obligation of means and not an obligation of result; consequently, passage of time alone is not a measure against which the manner in which the national authorities conduct an investigation can be assessed. The State party adds that the author's initial submission was not transmitted until May 2016 and would therefore have had no impact on the investigations and arrest referred to therein. In any event, the author had available to her the remedy of *amparo* to put forward her claims of undue delays.

6.10 Lastly, the State party points out that the criminal investigations into the facts alleged by the author were thorough and impartial, since they were conducted by an independent body that was not involved in the alleged acts, namely, the Office of the Attorney General of the Republic.

Author's comments on the State party's observations on the merits

7.1 In her comments of 4 June 2017, the author maintains that the investigations that have been ongoing since March 2006 have been delayed without justification and that it was only after the submission of the present communication to the Committee on 13 October 2014, which was announced in a public interview with the author on that date, that proceedings were brought against the two officers charged, although no new evidence had been adduced or investigations conducted since 2007.[18]

[18] The author cites *Ramírez et al. v. Mexico* (CAT/C/55/D/500/2012), in which the Committee against Torture pointed out the existence of an unjustified delay in investigations six years after the commission of acts of torture; those investigations were relaunched only after the communication had been submitted to the Committee.

7.2 The author claims that, when regulating the right to freedom of expression and the limitations imposed on the right to privacy and honour of persons, the State should not resort to such onerous measures as the application of criminal law, let alone custodial sentences. The author points out that, at the time of the events, the State of Puebla criminalized defamation and calumny and that it was on that legal basis that the detention order was issued against her, which violated her rights to personal freedom and freedom of expression.

7.3 Regarding the general measures taken by the State party, the author submits that the establishment of the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression has had no impact on efforts to reduce the widespread impunity for offences against journalists, as indicated by the Office in its 2016 report, according to which the level of impunity for these offences is 99.75 per cent.[19] For its part, the Mechanism for the Protection of Human Rights Defenders and Journalists has been severely criticized by Mexican civil society and international organizations because of the ineffectiveness of the protection measures granted by it.[20]

7.4 The author stresses that, although she was released shortly after her arrest, it was only on payment of bail of US$ 3,700.

7.5 The author maintains that the rulings of the commission of inquiry established by the Supreme Court of Justice of Mexico are not binding and they had been arrived at on political grounds rather than on the basis of criminal law. The commission had ruled that the telephone-tapping evidence could not be taken into account without also taking into account other evidence, including the public statements made by Mr. Nacif himself (see para. 2.9).

Additional information from the State party

8. In a note dated 18 June 2018, the State party indicated that, on 17 October 2017, the Second District Criminal Court of the State of Quintana Roo had convicted one of the two judicial officers on charges of torture and imposed a sentence of imprisonment for 5 years and 3 months, together with a fine, dismissal from his post and ineligibility for public functions for the duration indicated in the sentence. That decision was upheld at appeal by the District Court of the Sixth Region of Chihuahua on 13 March 2018.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee takes note of the State party's argument that the author failed to exhaust domestic remedies owing to the fact that she did not file an application for *amparo* to challenge the constitutionality of the criminal provisions of the State of Puebla establishing the offences of defamation and calumny and that there are several ongoing criminal investigations into the violations alleged by the author to have taken place during her detention and following her release.

9.3 However, the Committee notes the statements by the author — which the State party has not refuted — that the filing of an *amparo* application in respect of the constitutionality of the provisions establishing the offences of defamation and calumny would have been ineffective, since it would have resulted in the suspension of the criminal proceedings against her, in accordance with the Amparo Act in force at that time, thereby unnecessarily prolonging the proceedings and the risk of her suffering further attacks during her pretrial detention. The author has also submitted that it was not possible for her to file for *amparo*

[19] Statistical Report of the Office of the Special Prosecutor for Offences Committed against the Freedom of Expression, August 2016.

[20] The author cites, among other sources, the 2016 report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission for Human Rights.

relief against her detention before the detention took place, as required under domestic legislation, since she had not been notified of any investigation against her.

9.4 Regarding the ongoing criminal investigations into the author's complaints of, among other things, torture, abuse of authority and collusion, the Committee notes that the criminal investigations into torture reopened against two officers following the submission of the present communication resulted in the conviction of a single officer 12 years after the events occurred, a decision that was upheld at appeal; that another arrest warrant is still valid; that the investigations for abuse of authority and collusion were closed without any criminal proceedings being initiated; and that the investigations into the threats and intimidation to which the author had been subjected following her release have made no progress since 2007, have not led to any criminal proceedings being filed and have therefore been excessively lengthy. In these circumstances, and in the absence of any information in the file to suggest that there are any other pending criminal proceedings in relation to the author's complaints, the Committee considers that the domestic remedies available have been exhausted. In the light of the foregoing, the Committee finds that article 5 (2) (b) of the Optional Protocol is not an obstacle to the admissibility of the present communication.

9.5 The Committee notes that the author has not provided any information to justify the alleged violation of article 12 of the Covenant and therefore declares that this part of the communication is insufficiently substantiated, for purposes of admissibility, and finds it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee takes note of the author's claims under article 15 (1) of the Covenant, in the sense that while the offences of defamation and calumny are no longer criminal offences in a number of Mexican states, they are still offences in various other Mexican states and may have extraterritorial application, as in the case of the author, and such a situation impedes legal certainty. The Committee is of the view, however, that the coexistence of different criminal statutes in a federal State does not in itself violate the Covenant. In the absence of any information in the file to show that the acts attributed to the author did not constitute at the time of their commission offences under the law in force at the time, and without making any determination as to what law should be applied in the author's case, the Committee considers that the complaint based on article 15 (1) has not been sufficiently substantiated for the purposes of admissibility and therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.7 The Committee also notes the author's claims under article 14 (1) of the Covenant relating to the lack of independence and impartiality of the national courts that considered the criminal case against her. However, in the absence of further information or evidence in support of this claim, the Committee considers that the latter has not been sufficiently substantiated, for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

9.8 However, the Committee finds that the author's claims under articles 2 (3), 3, 7, 9, 10 and 19 of the Covenant relating to the treatment received during her arrest and detention, the lack of effective remedies to challenge such treatment and the restriction of her right to freedom of expression have been sufficiently substantiated for purposes of admissibility, declares them admissible and proceeds with their examination on the merits.

Consideration of the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee takes note of the author's allegations, which the State party has not challenged, concerning the treatment to which she was subjected during her transfer to the State of Puebla, including the repeated sexual assaults described by her, the death threats, the refusal to let her use the bathroom, sleep, eat or take the medication needed to treat her medical condition, and the sexual assaults against her during her detention on the premises of the Office of the Attorney General of the State of Puebla. The Committee considers that the treatment described constitutes a violation of article 7 of the Covenant.

10.3 The Committee further notes that the treatment to which the author was subjected had a discriminatory purpose based on her sex, in the light of the nature of the sexual comments made and of the sexualized treatment and gender-based violence inflicted on her. The Committee also takes note of the pattern of sexual violence against women detained in the State party and the prevailing impunity for such violations.[21] Consequently, the Committee considers that the treatment to which the author was subjected also constitutes a violation of article 3, read in conjunction with article 7 of the Covenant.

10.4 Having concluded that there has been a violation of articles 7 and 3, read in conjunction with article 7, the Committee does not consider it necessary to examine the author's complaint under article 10 of the Covenant separately in respect of the same facts.

10.5 The Committee takes note of the author's allegations that her detention on charges of defamation and calumny for her publication was a violation of her right to freedom of expression under article 19 of the Covenant. The Committee recalls that "freedom of opinion and freedom of expression are ... essential for any society. They constitute the foundation stone for every free and democratic society."[22] The Committee further recalls that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself" and that "the relation between right and restriction, and between norm and exception must not be reversed".[23] Furthermore, the restrictions must "be provided by law ... and conform to the strict tests of necessity and proportionality".[24]

10.6 In the present case, the Committee takes note of the authors' allegations, which the State party has not challenged, that, as a result of publishing a book in which she identified senior business leaders and officials involved in the sexual exploitation of children, one of the business leaders mentioned filed a complaint against the author in the State of Puebla for the offences of defamation and calumny, on the basis of the legislation in force in the State at that time, and that the complaint led to the author's arrest on 16 December 2005 by a group of at least 10 armed men, including private agents of the businessman in question. The Committee also takes note of the author's allegations that, at the time of her arrest, no arrest warrant was shown and that she was not allowed to contact her lawyer during her transfer, which lasted 20 hours. The State party submits that the author's detention was in accordance with the legislation in force at that time in the State of Puebla but has provided no further information to justify that the detention was necessary and proportionate.

10.7 The Committee recalls that "States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. ... All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims ... be in receipt of appropriate forms of redress."[25]

10.8 The Committee further recalls that "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".[26] If defamation should never result in a penalty of deprivation of liberty being imposed on the grounds that it is not an appropriate penalty, then a fortiori no detention based on charges of defamation may ever be considered either necessary or proportionate.

10.9 In the context described (see para. 10.6), and even assuming that the author's detention was based on the state legislation in force in the State of Puebla and that the

[21] In this regard, see the Committee's Views in *Purna Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 12.4.
[22] General comment No. 34 on freedoms of opinion and expression, para. 2.
[23] Ibid., para. 21.
[24] Ibid., para. 22.
[25] Ibid., para. 23.
[26] Ibid., para. 47.

legislation pursued a legitimate aim, such as protecting personal honour, the Committee considers that detention was not a necessary or proportionate measure to achieve that aim,[27] in violation of her right to freedom of expression under article 19 of the Covenant.

10.10 With regard to the author's allegations under article 9 of the Covenant which relate to the arbitrary nature of her arrest and detention, the Committee recalls its jurisprudence indicating that the concept of "arbitrariness" must not be equated with that of "against the law", but it should be interpreted more broadly such as to include considerations relating to inappropriateness, injustice, unpredictability and due process guarantees as well as those relating to reasonableness, necessity and proportionality.[28] The Committee further recalls that detention or imprisonment is arbitrary when it is used as a penalty for the legitimate exercise of rights guaranteed under the Covenant, such as freedom of opinion and expression.[29]

10.11 The Committee considers that, in the circumstances described and in the light of the public statements made by the businessman in question and by other high-level executive and judicial authorities of the State of Puebla, statements that have not been refuted by the State party, and for the reasons set out in paragraph 10.8, the author's detention was neither necessary nor proportionate but was punitive and consequently arbitrary, in violation of article 9 of the Covenant.[30]

10.12 Lastly, the Committee takes note of the author's allegations that she did not have access to an effective remedy for investigating and punishing those responsible for the violations of her rights within a reasonable time, in violation of article 2 (3) of the Covenant. The Committee notes in this respect that the author filed complaints for acts of torture, attempted rape, arbitrary detention and abuse of authority, among other offences, in March 2006, but that, 12 years later, no progress had been made in investigating several of those complaints. The Committee notes, in particular, that the prosecution service brought criminal proceedings against two judicial officials only in January 2008, that is, nearly two years later, and that the criminal courts nevertheless declined to open a criminal case. It was only in December 2014, after six years of inaction and shortly after the submission of the present communication to the Committee, that a new investigation was opened against the two officials and criminal proceedings were brought. This resulted in the conviction of one of the two officials in October 2017, nearly 12 years after the submission of the author's complaint, while the other official has evaded justice since December 2014. Regarding the other persons against whom complaints were brought, namely the businessman and the senior executive and judicial authorities of the State of Puebla, the prosecution service decided in June 2008 not to bring criminal proceedings. In the light of the foregoing, and in the absence of information from the State party justifying such significant delays, the Committee concludes that the author did not have access to an effective remedy to address the violations of her rights, in violation of article 2 (3), in conjunction with articles 3, 7, 9 and 19 of the Covenant.

10.13 The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 3, in conjunction with article 7; 9; 19; and 2 (3), in conjunction with articles 3, 7, 9 and 19 of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. In this connection, the State party should: (a) conduct an impartial, prompt and thorough investigation into the author's allegations; (b) prosecute, try and punish appropriately the persons found guilty of the violations; and (c) provide the author with appropriate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the

[27] In this connection, see the Committee's Views in *Rafael Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.8, and *Khadzhiyev v. Turkmenistan* (CCPR/C/121/D/2252/2013), para. 7.7. See also CCPR/C/MEX/CO/5, para. 6.8.

[28] General comment No. 35 on liberty and security of person, para. 12.

[29] Ibid., paras. 17 and 53.

[30] In this same regard, see the Committee's Views in *Rafael Marques de Morais v. Angola*, para. 6.1.

future and ensure that all journalists and human rights defenders are able to exercise their right to freedom of expression in their activities, including by decriminalizing the offences of defamation and calumny in all the federated states.[31]

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views and to have them widely disseminated.

[31] See CCPR/C/MEX/CO/5, para. 20.